

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-009865

05/22/2012

HON. JOHN REA

CLERK OF THE COURT
L. Gilbert
Deputy

KEVIN DUBY

H LEE HORNER JR.

v.

LINCOLN BENEFIT LIFE, et al.

CHRISTOPHER G HAMILL

CINDY M BRADFORD
5740 N 59TH AVE APT 1058
GLENDALE AZ 85301

MINUTE ENTRY

Plaintiff Kevin Duby, the adult son of Kim Skelly, brought this action against Kim's husband James Skelly pursuant to ARS 14-2803, Arizona's slayer statute. Mr. Duby contends that James Skelly committed first degree murder in the death of Kim Skelly.

After her divorce from Mr. Duby's father, Kim married Ray Lish, who worked at Shamrock Foods. James Skelly also worked and continues to work at Shamrock Foods. So did Kim Skelly. Ray Lish died in November 2003. James and Kim started seeing each other socially before Ray's death and their relationship deepened after Ray's death. Kim and James were married March 29, 2007.

Kim had a life insurance policy with Allstate that was converted to a Lincoln Benefit Life policy. In December 2003, after Ray's death, Kim designated Kevin as her beneficiary. In January 2007 Kim changed her beneficiary designation to James Skelly. Kim retired from Shamrock Foods in July 2009 with a vested balance in her 401(k). James Skelly was the named beneficiary pursuant to a designation in May 2007. James Skelly is also the named beneficiary of Kim Skelly's Shamrock Foods pension.

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Kim Skelly died October 15, 2009. James Skelly testified that Kim had been ill and gone to sleep the night before. He awoke the next morning to find her dead. Police came, along with the medical examiner. Because the medical examiner was concerned of the public health effects because Kim had been suffering from H1N1 flu, the examiner excluded police from the scene and conducted the investigation.

The final autopsy report was delayed for several months to receive toxicology reports. The report, dated January 28, 2010, found "acute poly drug toxicity" as well as H1N1 influenza and tobacco smoking. The Medical Examiner concluded: "Based on the autopsy findings and all other investigative information, including medical records and police reports received to date and available to me, it is my opinion that the decedent, a 47-year-old female, died of acute polydrug toxicity involving the combined effects of the prescription drugs, morphine and oxycodone, and that an influenza (H1N1) viral infection and tobacco smoking were contributory factors in her death."

In February 2010, Kevin was told by the Scottsdale Police Department that Kim's death would never be ruled a homicide. He filed this action a month later.

Kim Skelly had a long history of prescription drug abuse. Her heavy use of hydrocodone began before Ray's death. A Walgreens store in Payson sold Kim 1,476 hydrocodone pills in 2003. From April 2006 to August 2006, Kim was treated by Dr. Levine for opiate dependency and Soma withdrawal. Her patient medical history listed a 6 year opiate use and 6 year Soma use. She saw Dr. Levine again in November 2007 after a relapse. In September 2009, a month before her death, Kim was admitted to Scottsdale Healthcare-Thompson Peak with epigastric pain. She received intravenous morphine, among other drugs. Her doctor noted that her complaints of severe pain appeared out of proportion to the medical findings.

Kim also had a history of obtaining prescriptions for opiate pain pills from multiple providers.

No witness was able to describe any sign of marital discord between Kim and James Skelly prior to Kim's death.

The Plaintiff's theory has developed over time. The Complaint alleges that James Skelly encouraged Kim's drug use and failed to render aid on the night she died. The Court ruled that those theories were insufficient as a matter of law to establish first degree murder. At trial, Plaintiff presented a different theory.

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Plaintiff's expert Dr. Williams opined that Kim Skelly died from suffocation by having a pillow pressed against her mouth by James Skelly. He arrived at this opinion by reliance on several factors: (1) his findings of indications of deceit by James Skelly in his 911 call reporting the death of his wife; (2) his belief that the amounts of morphine and oxycodone in Kim Skelly's system were only slightly above therapeutic levels and far from lethal; (3) his analysis of photographs showing, in his opinion, that the Robitussin bottle was in an "odd place," that the disarray of bed sheets indicated a struggle, that Kim Skelly's rings were not positioned on her fingers as one would expect, and that he believed there were facial imprints on the pillow that "could be" consistent with Kim's face being pushed into the pillow.

Dr. Williams is an emergency department physician with many years' experience in that specialty. He has no training in crime scene investigation and has not performed pathological examinations to determine a cause of death except to provide a cause of death for patients who expire in the emergency room.

Dr. Williams's opinions regarding the truth and falsity of Jim Skelly's statements to the 911 operator relied, to the extent they were based on any education or training, on a course Dr. Williams took in the Sapir method of truth detection. There was no evidence that the Sapir theories are a method of truth detection generally accepted in the scientific community. Dr. Williams acknowledged that he was unaware of any studies of the reliability of the method published in peer reviewed publications. Dr. Williams's opinions regarding Jim Skelly's truthfulness in the 911 testimony would not have survived an objection under Evidence Rule 702. Notwithstanding the lack of objection, the Court places no weight on Dr. Williams's opinions regarding possible deceit by James Skelly in his call to 911.

Likewise, Dr. Williams's analysis of the photographs is given little weight. Even the best emergency room physician does not gain training, expertise, or experience in analyzing crime scenes from photographs, inferring struggle from creases in bed sheets, or reading the imprint of a face in a pillow.

Dr. Williams's medical testimony is given greater weight, although he has little knowledge of toxicology. His understanding of toxic levels of morphine and oxycodone initially came from a consultation with poison control and changed over time, even during trial. Dr. Williams believed that Kim Skelly's swine flu, tobacco smoking, and mild emphysema had nothing to do with her death, although he acknowledged that flu symptoms include coughing, nausea, and vomiting, that Kim Skelly was a "significant smoker," and that flu, smoking, and emphysema all compromise respiratory function.

Plaintiff's theories of struggle and suffocation were not supported in any way, and were in the most part rejected, by the testimony of David Jacobs, the crime scene specialist, and

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Officer Jones. They were categorically rejected by the defense expert, Dr. Keen. As between the testimony of Dr. Williams and that of Dr. Keen, the Court finds Dr. Keen to be more experienced, more knowledgeable about the relevant issues, and more persuasive.

To be sure, there are unanswered questions – Where is the Robitussin measuring cap? Where did Kim Skelly get the morphine and oxycodone and why are there no empty bottles or bags? Many inferences can be drawn about these ambiguous circumstances. Inferences supporting suffocation are no more likely than inferences consistent with the cause of death found by the medical examiner.

Plaintiff offered into evidence exhibit 28, a Readers Digest Crime Scene Investigation book, apparently to suggest that James Skelly did some research into ways to avoid detection. James Skelly denied ever seeing the book. Plaintiff pointed to no particular portion of the book that James Skelly may have consulted. The Court finds no inference to be drawn from the existence of the book in the storage unit.

Plaintiff also presented evidence of James Skelly's past drug use, including use of morphine and of tax liens. The liens were not filed until after Kim's death and the largest of the liens was for 2009 taxes, which were not due until after Kim's death. The Court does not find the evidence of drug use or tax liens persuasive circumstantial evidence of motive for murder.

Under ARS 14-2803, a person who "feloniously and intentionally" kills another is forfeited from receiving intestate benefits or obtaining property as a beneficiary. First degree murder, ARS 13-1105, falls within the definition of 14-2803. See, *Castro v. Ballesteros-Suarez*, 222 Ariz. 48 (App. 2009). To obtain relief under 14-2803, Plaintiff must prove by preponderance of the evidence that James Skelly committed first degree murder in the death of Kim Skelly.

The Court finds that the Plaintiff has not carried the burden of proving first degree murder by a preponderance of the evidence.

The Court finds for the Defendant on Plaintiff's Complaint.

James Skelly asserted counterclaims for abuse of process and intentional interference with contract. The elements of an abuse of process claim are: (1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings. *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 257 (App. 2004). There are two additional requirements. First, a claimant must show that the defendant's improper purpose was the primary motivation for its actions, not merely an incidental motivation. Second, the claimant

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must prove that the defendant used a court process in a fashion inconsistent with legitimate litigation goals. *Id.*, 208 Ariz. at 259.

Skelly argues that Kevin Duby's claims were "false and baseless" and "never supported by the facts." He points to exhibit 49, a letter from Plaintiff's counsel to defense counsel urging that Skelly consider settlement because a trial could result in renewed interest in criminal charges against Skelly.

The letter was a negotiation tactic in pursuit of settlement, which is a legitimate litigation goal. An abuse of process claim requires a showing of more than a false and baseless claim.

The Court finds that James Skelly has failed to establish an abuse of process in Kevin Duby's prosecution of his Complaint.

The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interferor; (3) intentional interference inducing or causing a breach; (4) resultant damage to the party whose relationship has been disrupted; and (5) that the defendant acted improperly. See, *Wells Fargo Bank v. Ariz. Laborer, Teamsters & Cement Masons*, 201 Ariz. 474 ¶ 74 (2002).

This Counterclaim is also based on the lack of merit to Kevin Duby's various attempts to frustrate James Skelly's collection of the funds to which he was named beneficiary. Although Kevin Duby's claims were unsupported, lack of merit does not satisfy the element of improper action. In addition, there is no showing of any breach of contract.

The Court finds for Plaintiff Kevin Duby on both counts of James Skelly's Counterclaim.

FILED: Exhibit Worksheet

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.